(1)
Supreme Court, U.S.
FILED
00-374 SEP 5 2000
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ALVIN ABRAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari

David I. Schoen
Counsel of Record
LAW OFFICE OF DAVID I. SCHOEN
2800 Zelda Road
Suite 100-6
Montgomery, Alabama 36106
(334) 395-6611

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

64pp

QUESTIONS PRESENTED

1. Whether, consistent with the Fifth and Sixth Amendments to the United States Constitution and this Court's jurisprudence, the government can use an attorney informant and other confidential informants agents to obtain confidential defense strategy information from a criminal defendant in order to procure a plea of guilty?

2. Whether, in a case in which the government uses an attorney informant and other confidential informants to deliberately interfere with a criminal defendant's Fifth and Sixth Amendment rights, the defendant bears the burden of proving that information obtained through such intentional interference provided the basis for the government's prosecution against him and led to his decision to plead guilty?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Procedural History 2

B. Facts Material to the Questions Presented ... 3

Reasons for Granting the Writ 13

I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Well Established Authority Under The Fifth And Sixth Amendments Regarding The Government's Use of Informants to Elicit Information Directly From an Indicted Criminal Defendant And Because it Involves a Critically Important Constitutional Principle That Was Wrongly Decided 13

II. The Petition Should Be Granted to Resolve a Split of Authority Among The Circuit Courts of Appeals as to Where The Burden For Establishing Reversible Error From The Government's Intentional Intererence With a Criminal Defendant's Sixth Amendment Right to Counsel And Because Important Constitutional Issues Were Wrongly Decided 21

Conclusion 30

Appendix to the Petition

TABLE OF CITATIONS

Cases Cited:

Brady v. Maryland,
373 U.S. 83 (1963) 23

Briggs v. Goodwin,
698 F.2d 486 (D.C. Cir.),
reh'g granted, opinion vacated, and on reh'g,
712 F.2d 1444 (D.C. Cir. 1983),
cert. denied, 464 U.S. 1040 (1984) 28

Cahill v. Rushen,
501 F. Supp. 1219 (E.D.Ca. 1980) 17

Chambers v. Mississippi,
410 U.S. 284 (1973) 5

Cinelli v. City of Revere,
820 F.2d 474 (1st Cir. 1987), *cert. denied*,
485 U.S. 1037 (1988) 29

Cronic v. United States,
466 U.S. 648 (1984) 29

Elkins v. United States,
364 U.S. 206 (1960) 22

Franklin v. Duncan,
884 F. Supp. 1435 (N.D.Ca. 1995) 17

Giglio v. United States,
405 U.S. 150 (1972) 22, 23

Hancock v. White,
378 F.2d 479 (1st Cir. 1967).....16

Illinois v. Perkins,
496 U.S. 292 (1990).....16

Kastigar v. United States,
406 U.S. 441 (1972).....29, 30

Kuhlman v. Wilson,
477 U.S. 436 (1986).....17

Kyles v. Whitley,
514 U.S. 419 (1995).....24

Massiah v. United States,
377 U.S. 201 (1964).....14, 19

Maine v. Moulton,
474 U.S. 159 (1985).....15, 16

Patterson v. Illinois,
487 U.S. 285 (1987).....15

Rose v. Mitchell,
443 U.S. 545 (1979).....22

South Carolina v. Quattlebaum,
527 S.E.2d 105 (S.C. 2000).....27

United States v. Amlani,
111 F.3d 705 (9th Cir. 1997).....27

United States v. Anderson,
31 F. Supp. 2d 933 (D. Kan. 1998).....25

United States v. Avellino,
136 F.3d 249 (2d Cir.), *rehearing denied*,
1998 U.S. App. LEXIS 7818 (2d Cir. 1998) ... 23, 24

United States v. Aviles,
170 F.3d 863 (9th Cir. 1998) 25

United States v. Bennett,
409 F.2d 888 (2d Cir.), *cert. denied sub nom.*,
Haywood v. United States,
396 U.S. 852 (1969) 29

United States v. Bhutani,
175 F.3d 572 (7th Cir. 1999) 25

United States v. Bryan,
868 F.2d 1032 (9th Cir. 1989) 24

United States v. Burnside
824 F. Supp. 1215 (N.D. Ill. 1993) 23

United States v. Calder,
641 F.2d 76 (2d Cir.), *cert. denied*,
451 U.S. 912 (1981) 16

United States v. Costanzo,
625 F.2d 465 (3d Cir. 1980) 27

United States v. Cruz,
785 F.2d 399 (2d Cir. 1986) 16

United States v. DeGregorio,
795 F. Supp. 630 (S.D.N.Y. 1992) 27

United States v. Endicott,
869 F.2d 452 (9th Cir. 1989) 25

United States v. Gambino,
835 F.Supp. 74 (E.D.N.Y. 1993), *aff'd*,
59 F.3d 353 (2d Cir. 1995), *cert. denied*,
517 U.S. 1187 (1996).....23

United States v. Gatto,
763 F.2d 1040 (9th Cir. 1985).....24

United States v. Glover,
596 F.2d 857 (9th Cir.), *cert. denied*,
444 U.S. 857 and 444 U.S. 860 (1979).....28

United States v. Hammad,
858 F.2d 834 (2d Cir. 1988) 14, 20, 21, 27

United States v. Haworth,
70 F.3d 1132 (10th Cir. 1995).....28

United States v. Henry,
447 U.S. 264 (1980).....*Passim*

United States v. Irwin,
612 F.2d 1182 (9th Cir. 1980).....14, 26

United States v. Jackson,
850 F. Supp. 1481 (D. Kan. 1994).....23

United States v. Jacobs,
986 F.2d 1231 (8th Cir. 1993).....25

United States v. Johnson,
818 F. Supp. 1004 (S.D.Tex. 1993).....14

United States v. Kelly,
790 F.2d 130 (D.C. Cir. 1986).....28

United States v. Levasseur,
699 F. Supp. 965 (D. Mass. 1988)..... 23

United States v. Levy,
577 F.2d 200 (3d Cir. 1978)..... 27

United States v. Lozado-Rivera,
177 F.3d 98 (1st Cir. 1999)..... 15

United States v. Marshank,
777 F.Supp. 1507 (N.D.Ca. 1991)..... 14, 16

United States v. Mastroianni,
749 F.2d 900 (1st Cir. 1984)..... 29

United States v. Medina-Medina,
617 F. Supp. 1163 (S.D.Ca. 1985)..... 17

United States v. Melgar,
139 F.3d 1005 (4th Cir. 1998)..... 17, 24

United States v. Miranne
688 F.2d 980 (5th Cir. 1982)..... 23

United States v. Morales,
635 F.2d 177 (2d Cir. 1980)..... 27, 28

United States v. Morrison,
449 U.S. 361 (1980)..... 26, 27

United States v. North,
910 F.2d 843 (D.C. Cir.), *amended*,
920 F.2d 940 (D.C. Cir. 1990)..... 29

United States v. Ofshe,
817 F.2d 1508 (11th Cir. 1987)..... 14

United States v. Pelaes,
790 F.2d 254 (2d Cir. 1986) 16

United States v. PHE, Inc.
965 F.2d 848 (10th Cir. 1992) 22

United States v. Russell,
411 U.S. 423 (1973) 14

United States v. Sampol
636 F.2d 621 (D.C. Cir. 1980) 22

United States v. Steele,
727 F.2d 580 (6th Cir.), *cert. denied*,
467 U.S. 1029 (1984) 28

United States v. Terzado-Madruga,
897 F.2d 1099 (11 Cir. 1990) 17

United States v. Trevino,
556 F.2d 1265 (5th Cir. 1977) 24

United States v. Wood,
57 F.3d 733 (9th Cir. 1995) 24, 25

Weatherford v. Busey,
429 U.S. 545 (1977) 26, 27, 28

Statutes Cited:

15 U.S.C. § 77q 2

18 U.S.C. § 371 2

28 U.S.C. § 1291 3

31 U.S.C. § 5313(a) 2

28 C.F.R. § 77.5 14

United States Constitution Cited:

Fifth Amendment 2

Sixth Amendment 2

Rules Cited:

Preamble,
Code of Professional Responsibility 20

DR-7-104(A)(1),
Code of Professional Responsibility 14, 20

Articles and Other Sources Cited:

Uviller, *Presumed Guilty,*
The Court of Appeals Versus Scott Turow,
136 U.Pa.L.Rev. 1880 (1988) 14

ABA, *Project on Standards for Criminal Justice, Discovery and Procedures Before Trial @ §2.1(d)* 23

IN THE SUPREME COURT OF THE UNITED STATES

ALVIN ABRAMS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Alvin Abrams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Summary Order of the court of appeals, its order denying rehearing, and the district court's relevant orders [App., *infra*, 1-23] are unpublished. The Summary Order is reported at 1999 U.S. App. LEXIS 38370 (2d Cir., December 30, 1999).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 30, 1999 [App. 1] and denied rehearing on April 7, 2000 [App. 10]. The jurisdiction of this Court is evoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, in relevant part: "*** nor shall (any person) be compelled in any criminal case to be a witness against himself, nor *** be deprived of life, liberty, or property without due process of law; ***"

Amendment VI to the Constitution of the United States provides, in relevant part, "(I)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury *** to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Procedural History

On November 2, 1992, Alvin Abrams was arrested and charged with a single count of structuring a currency transaction to evade the reporting requirements of 31 U.S.C. Section 5313(a). On January 22, 1993, Mr. Abrams entered a plea of guilty to a three count superseding information charging him with violating the securities laws under 15 U.S.C. Section 77q and with conspiring to do so under 18 U.S.C. Section 371. After learning that his long-time attorney who had convinced him to plead guilty and others in the defense camp had been acting as government informants since well before his arrest and after his indictment, Mr. Abrams filed motions to withdraw his guilty plea. On May 22, 1998, after having his motions denied, Mr. Abrams was sentenced to 30 months in prison, three years supervised release, and a $75,000 fine, plus the costs of incarceration.

Mr. Abrams timely filed a notice of appeal in the United States Court of Appeals for the Second Circuit. That court had jurisdiction to hear the appeal under 28 U.S.C. Section 1291.

On direct appeal, his conviction was affirmed in a Summary Order, issued December 30, 1999. [App. 1][1] His motion for re-hearing and suggestion or re-hearing *en banc* were denied on April 7, 2000. [App. 10] This Petition is filed pursuant to this Court's Order dated June 22, 2000.

B. Facts material to the questions presented.

Alvin Abrams is a man in his late sixties who, since 1959, operated his own small investment brokerage firm in Manhattan. In his brokerage firm, First Philadelphia Corporation, Mr. Abrams employed a bookkeeper by the name of Mervyn Lerner. Edward Grushko was his attorney for the brokerage firm and for his personal affairs.

On November 2, 1992, FBI agent Greg Coleman arrested Mr. Abrams at his office in Manhattan and seized his business records pursuant to a warrant and a Complaint alleging the structuring of a currency transaction. Coleman took Abrams from his office in Manhattan (Southern District of New York) to Brooklyn (Eastern District of New York).

On November 9, 1992, Abrams was indicted in the Eastern District of New York on a single count of structuring a currency transaction.[A49]

Following his arrest, Mr. Abrams hired a criminal attorney, Winograd, to represent him, along with Grushko. Winograd told Abrams that there was "something fishy" about the case, that the venue was improper, and that he suspected that people close to Abrams must be informants. Grushko immediately convinced Abrams to fire Winograd, concocting a story that the district judge was a known anti-

---

[1]References herein to the Appendix to this Petition are "App...." References to the Appendix below are "A ...."

Semite and that Abrams needed a Gentile lawyer. Grushko, also a Jew, advised that he would advise Abrams from the background. Grushko insisted that Abrams would be "better off" not fighting the case. Within a few days, at Grushko's direction, Abrams fired Winograd and replaced him with Robert J. Costello, Esq. On November 9, 1992, Abrams was indicted.

Unbeknownst to Abrams, his attorney, Edward Grushko, was in the employ of the government as a confidential informant and had been for many years. For months preceding and post dating Abrams' indictment in this case, while Abrams met with Grushko to get his legal advice, Grushko had his own agenda; for he was awaiting sentencing and was "cooperating" with the government for the express purpose of minimizing his sentence. Grushko acted as Abrams' attorney and confidant throughout the investigation and the period leading up to the guilty plea and beyond [App. 3], eliciting information from Abrams and providing it to the government, actively directing Abrams' defense strategy in this case, advising him as to who to employ as his attorney and directing him to plead guilty to specific charges and to "cooperate."

Abrams' bookkeeper, Mervyn Lerner, also played a key role for the government after Abrams' arrest on November 2, 1992. In an uncontroverted letter Lerner wrote to the prosecutor in the case, Lerner revealed that after Abrams' arrest and before and after his indictment he met with FBI Agent Greg Coleman and told him about conversations in which he had participated with Abrams and Abrams' attorneys. Lerner further reported that agent Coleman asked him (and he told Coleman) about defense counsel's concerns and suspicions and the possible defenses that were being considered for Abrams.[A207] As with Grushko, the government insinuated Lerner into Abrams' defense camp and then elicited information from him about that defense. Lerner continued to provide documents and information to the government. [A207] Shockingly, nowhere

in either of the lower courts' decisions is the matter of Lerner even mentioned; yet it was a central issue raised by Mr. Abrams and it reflects an egregious violation of his Fifth and Sixth Amendment rights.[2]

Costello represented Abrams from November of 1992 until August 23, 1993. Costello, a former deputy chief of the criminal division of the United States Attorney's Office for the Southern District of New York, swore below that from early November of 1992 through at least early December of 1992, Abrams was adamant about fighting the case and not pleading guilty. [A370-71]

In December, Abrams came to Costello with an abrupt change in his position, advising him that he wanted to enter into a plea agreement and cooperate with the government. He told Costello that he had learned about colleagues who were intending to testify against him. He did not identify the source of that information; but he convinced Costello that he knew about it.[A372] On December 10, 1992, Costello set up a proffer session between Abrams, Polkes and Coleman. A plea and cooperation agreement were signed.[A95] Abrams then began providing the government with the information it sought, generally through Agent Coleman. Costello and/or his partner attended some of the cooperation sessions.[A373] On January 22, 1993, Mr. Abrams pled guilty to a Superseding Information, charging him with one count of conspiracy to violate the securities laws and two counts of securities fraud.[A102]

In May of 1993, Abrams went to Costello's office in a very emotional state. Abrams was upset because in a

---

[2]This is a most unfair way of dealing with such a striking and factually uncontroverted issue from any standpoint, in light of the obligations and expectations traditionally placed on federal appellate courts. *See e.g., Chambers v. Mississippi*, 410 U.S. 284, 303 (1973)(White, J., concurring)("We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it").

conversation he had with Agent Coleman, Coleman told Abrams that he had heard that Abrams was considering cooperating with the SEC. Abrams knew that the only person to whom he had confided this information was Grushko, his long-time attorney. Abrams began to suspect that Grushko was an informant. Abrams explained to Costello that Grushko had been giving him legal advice since his arrest and indictment. It was Grushko who had directed him to fire Winograd, it had been Grushko who had caused him to change his mind and to plead guilty, and it was Grushko who told Abrams that certain of his colleagues were going to testify against him. Each step he had taken in his defense was based on Grushko's advice and information Grushko provided.[A373-74] Costello was shocked by the government's conduct and decided to investigate. He learned that Grushko was a convicted felon who had pled guilty in a federal case in Nevada years earlier and was awaiting sentence.[A376]

On June 10, 1993, Abrams was scheduled to meet with Grushko again. Costello set up Abrams with a tape recorder so that he could record their conversation. Costello watched Abrams talking to Grushko from the distance. Costello then followed Grushko, saw him go to a public phone, and heard him tell his listener that he had "just finished meeting with him." Based on his experience as a federal prosecutor, Costello concluded that Grushko was reporting to his government contact. Costello then retrieved the tape recorder and the tape from Mr. Abrams. The tape reveals that Grushko, while in the employ of the government as a cooperating witness, elicited key information from Abrams and directed his defense, while assuring Abrams that everything they discussed was attorney-client privileged. It is also clear that Abrams believed his conversations with Grushko were all covered by such privilege and that this was important to him. [A133]. Grushko advised Abrams how to handle his defense, how to cooperate with the government, what to tell the government and, in specific detail, how he

should proceed with his case. Grushko admitted concealing his informant status; but assured Abrams he would never "hurt" him. [A132-50]

The charges drafted against Abrams in the Superseding Information related to profits that he shared with an underwriter, Stratton Oakmont for "parking" some of their initial public offerings (IPOs). Abrams paid the underwriter's share of the profit in cash. Grushko had advised Abrams that he should plead guilty to securities charges and faxed him statutes that supported his "recommendation." They were the same statutes Grushko had pled to in Nevada [A39]. The companies involved were companies with which Grushko had been involved.

Debriefing notes the defense obtained from the Southern District of New York in 1997 (withheld by the government for the evidentiary hearing) reveal that virtually all of Grushko's conversations with Abrams and other client/targets, at the government's direction, concerned attorney-client privileged matters. The government even identified some of the conversations as such in their notes, [A51-94], leaving no question that they knew Grushko remained Abrams' attorney. Subpoenas to the Southern District and numerous other sources revealed rather starkly that the government's repeated denials that any *Brady* information or material existed in this case were absolute lies. Indeed the U.S. Attorney's debriefing notes showed, among a vast array of other shocking things, that Grushko reported back to them about meetings he had with Abrams the day before Abrams' guilty plea and twice on the day of the guilty plea.[A1021] The notes also reveal that representatives of the SEC and other agencies who were in communication with the Eastern District Assistants participated in the debriefings. Grushko blatantly gave perjured testimony on the subject at the evidentiary hearing and the government knowingly permitted it, confident that the notes would never surface.

FBI Agent Coleman continued to mislead Abrams even after Abrams had discovered Grushko's cooperation. Because of his suspicions by this point, Abrams tape recorded a conversation that he had with Coleman on June 16, 1993. In that conversation, Coleman admitted knowing that Grushko had been acting as Abrams' lawyer and he assured Abrams that anything Abrams told Grushko was privileged. [A151-73]

When Abrams learned that Grushko had been a government informant all along, he realized that he had been betrayed by his own lawyer and his closest confidant during the most critical time period in the events related to the charges against him. He moved to withdraw his plea and sought discovery. The government's responses to Abrams' detailed discovery requests from start to finish in this case were a shocking campaign of concealment and outright intentional lies. Truncated hearings were held without any relevant documents produced.

When defense counsel learned that the district judge intended to truncate the process, he made a comprehensive offer of proof, including affidavits from prominent and credible witnesses, notes from Southern District debriefings of Grushko that were most revealing of the nature of his relationship and the government's efforts at using him to infiltrate Abrams defense, elicit attorney/client privileged discussions with Abrams, report details of the same to the government, and using Grushko to direct Abrams defense. The offer of proof also included copies of faxes from Grushko to the Southern District and from the NASD to the Southern District and from the Southern District to the Eastern District.

On September 30, 1997, Judge Platt permitted limited oral argument on the outstanding matters, but said that he already had written his opinion in the case and simply had to check it over before delivering it. A brief recess was taken and the court then filed its opinion. The opinion contained incredible and disingenuous findings completely

contradicted by the defense's offers of proof. The most glaring and unfathomable finding, on which the Court of Appeals, in large part, based its decision, [App. 4], was the following:

"There has been no showing or evidence of any kind that Mr. Grushko was working for the government on this case or even that the Eastern District United States Attorneys Office ever knew Mr. Grushko was acting as a government informant. Moreover, there was no evidence that government deprived or attempted to deprive the defendant of effective assistance of counsel." [App. 22]

The government's entire approach to Mr. Abrams repeated, specific, relevant and material discovery requests throughout these proceedings below ranged from misleading to conscious avoidance to outright demonstrable lies. The prosecutors denied using any informants in the case, misled as to their use of Grushko, denied any contact with Lerner, denied any contact with the agencies with whom Grushko had been cooperating for years, and entirely perverted the truth. [e.g., A928; 229; 234-237; 240; 933] Unfortunately, because of the district judge's handling of the matter, the government was able to engage in such conduct with impunity.

Mr. Abrams' lawyer, Yale Law School Professor Steven Duke, who has called this case the most egregious case of prosecutorial misconduct he has ever encountered in 40 years at the bar, was later able independently to obtain documents which reflected Grushko's work with the government; but he was never given the chance to confront Grushko with the documents. Just when the true facts about Grushko began to surface, after years of being suppressed, the district judge abruptly, and without warning, cut off all further discovery, refused to give any further evidentiary hearing, and forced Mr. Abrams to go forward with sentencing to the absolute shock of defense counsel, in the face of a detailed offer of proof, and in contravention of all

the court had led the defense to believe from its previous orders.

The defense had learned, *inter alia*, from its independent investigation, about the following links between information Grushko had provided to various government agencies and the Eastern District of New York:

- Grushko clearly had direct contact with FBI case agent Coleman about Abrams.[3]
- The SEC linked Grushko to the Eastern District.[4]

---

[3]On July 24, 1996, Grushko testified that his Southern District "cooperation" included "Special Agents." [A399] He misidentified S.D. investigator Doonan as an FBI agent; but then said he met with others who were with the FBI. [A400] Abrams' case agent, Coleman is, of course with the FBI; so the de-briefings with his agency ought to be attributable to him; but the record shows a more direct link. When asked if he had met with Coleman, Grushko answered "not to my knowledge" [A400], and later, said he did not "recall" ever speaking to him. [A473] His "knowledge" and "recollection" failed him. In the recorded conversation in June, 1993, Coleman first tried to dodge Abrams' questions about whether he had spoken to Grushko. Finally Coleman admitted that he had spoken to Grushko and that Grushko said that he (Grushko) could convince Abrams to cooperate. [A169] Coleman acknowledged that it would serve Grushko's best interests to discuss Abrams with the government. [A169-70]

[4]SEC investigator Fanslau participated in the SDNY de-briefings. [A61] Grushko "cooperated" extensively with the SEC over many years, speaking approximately 50 times to his SEC "handler" Whitten and providing him with documents.[A673-77] He identified Abrams as his client to Whitten. [A447]

At a deposition in a related case, Whitten admitted knowing Coleman since 1992 and speaking to him; but he refused to answer any question on the substance of his discussions with Coleman. [A189-90] At the evidentiary hearing in this case, however, he admitted speaking to Coleman about First Philadelphia and its underwritings, [A677-78], and sending files to Polkes that related to Abrams. [A677-78] Additionally, former SEC Commissioner Sargent provided sworn testimony that the SEC reported that it sent its entire file and all information it had compiled, to the Eastern District to be used in the Abrams' prosecution. [A256-58] The SEC also faxed material to Polkes. [A994]

- The Southern District linked Grushko to the Eastern District.[5]

This is yet another subject on which AUSA Rial brazenly lied to the lower court. On January 4, 1996 in response to Abrams' discovery request and the court's specific question on the subject, Rial told the court that he had spoken to 3 representatives of the SEC. When Judge Platt asked Rial directly whether the SEC had anything information that would have any impact on Mr. Abrams' case, Rial responded, "None at all." [A237] He mentioned nothing about Grushko's years of de-briefings with the SEC or the documents Grushko gave to the SEC related to Abrams, First Philadelphia, and the underwritings, and he concealed entirely that the SEC files had all been sent to his office. [see A256-58;677-78;994] At that time, defense counsel did not know about these things; so he could not respond.

[5]On August 6, 1992, AUSA Tomback, Grushko's SDNY "handler", faxed documents from Mr. Abrams to EDNY AUSA Polkes. [A990-93] On the cover sheet Tomback wrote, "good luck. Keep me posted." [A990]

This note obviously indicates that there were conversations between the two prosecutors which preceded it, accounting for the Southern District prosecutor's knowledge that any such documents would be of interest to the Eastern District, and that there very likely was communication between the two afterwards pursuant to Tomback's request that he be kept "posted." The government's claim in its brief that this fax is meaningless because it does not mention Grushko's name, [GB28-29], is absurd. The fax was cited to show the ongoing communication between the prosecutor who was de-briefing Grushko and the E.D.N.Y. prosecutor prosecuting Abrams. The fax consisted of letters from Abrams on his letterhead. It was found by counsel for Mr. Abrams in the Abrams FBI file in the E.D.N.Y. [A979;990-93]

Tomback expressly admitted to defense counsel that he knew about the Eastern District's "overlapping" prosecution of Abrams and he admitted talking to Polkes about the case it (he would not reveal what they discussed). [A974-75] He was upset that the Eastern District was going forward, noting that they had not come up with anything on it for years. [Id.] NASD examiner Foreman advised that Tomback reluctantly agreed to defer to the Eastern District prosecution. [A977-78] That explains his note to Polkes. Grushko, of course, was the centerpiece of the Southern District's investigation, by all accounts. Tomback could not have discussed the matters with Polkes without reference to Grushko and the information he provided.

- The U.S. Postal Service linked Grushko to the Eastern District.[6]

In short, Grushko and the information he provided was inextricably intertwined with the cases against Mr. Abrams and there was extensive sharing of information and materials among all of the agencies and the Eastern District in the investigation and prosecution of this case. Grushko's use was a blatant violation of Mr. Abrams' constitutional rights and the government's (and Grushko's) ethical obligations. This prosecution was the direct product of the

---

Set out at A994-1000 are several other documents faxed to E.D.N.Y. AUSA Polkes and found in the Abrams FBI E.D.N.Y. file. These are also from people with the SEC and NASD who de-briefed Grushko about Abrams. Such extensive coordination with these agencies in Polkes' investigation of Abrams makes it simply incredible that these same agencies failed to mention Grushko and his de-briefings about Abrams. His was the central investigative tool they used, de-briefing him over 50 times. [A673] No one would believe he did not mention Grushko's name; but whether or not he did is quite beside the point. Grushko's handler at the SEC admitted talking to both Polkes and Coleman about Abrams and First Philadelphia. [A677-78] Grushko was Whitten's main source of information on Abrams and the underwritings at issue in this case. Any information he gave to Polkes and Coleman was, by definition.

[6]Ray Moore of the USPS participated in the Southern District Grushko de-briefings. [A60-61;399] It was also the USPS that made the related case against Leitner that Polkes prosecuted. [A647] Grushko gave the government extensive information about Leitner [A52-94] Grushko convinced Leitner to "cooperate" [A405] We now know that Leitner, fraudulently posing as a CPA, became the primary witness against Abrams. [GA14-17] Another coincidence connects them. Grushko's diary notes reflect that he reported to the SDNY conversations he had with Leitner about possibly bribing the accounting form Leitner had defrauded. [A53;1123;1104] This is exactly the matter Coleman describes in reporting a surreptitious taping of Leitner. [GA14-17;648] Polkes also admitted Tomback "shared" information with him about the Leitner case. [A655] It is inconceivable that Grushko did not come up in Leitner's de-briefings, given that Grushko was the lawyer on the fraudulent audits for which Leitner was prosecuted. [A408]

government's unlawful and unethical conduct and the case against Mr. Abrams is the fruit of that poisonous tree, directly and indirectly through Grushko.[7]

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S WELL ESTABLISHED AUTHORITY UNDER THE FIFTH AND SIXTH AMENDMENTS REGARDING THE GOVERNMENT'S USE OF INFORMANTS TO ELICIT INFORMATION DIRECTLY FROM AN INDICTED CRIMINAL DEFENDANT AND BECAUSE IT INVOLVES A CRITICALLY IMPORTANT CONSTITUTIONAL PRINCIPLE THAT WAS WRONGLY DECIDED

---

[7]We also ask the Court to take into consideration the degree to which Grushko perjured himself on relevant issues. Here are just some examples:

- Grushko testified that he never told anyone in law enforcement about any sort of structuring or currency transactions with which Abrams might have been involved. [A515]

The de-briefing notes speak for themselves. [e.g. A55;57] AUSA Tomback specifically said that the first thing Grushko told him about Abrams was that Abrams had proposed a money laundering scheme to him. [A974]

- Grushko testified that he never told anyone in law enforcement anything incriminating about Abrams and was never aware that Abrams would even contemplate anything illegal. [A472]

Again, the debriefing notes adequately demonstrate the lie. When AUSA Tomback was told of this testimony, he said "I won't comment on Grushko's credibility." [A974]

Grushko's claims that he did not know about Abrams' criminal troubles for months [e.g. A468] is contradicted by many sources. [A524;538;981-83;984-86;1094,etc.] and by his direct involvement in the civil forfeiture case, brought on the same day as Abrams' indictment and based on Abrams' purported criminal conduct - the basis for Polkes' efforts to stop discovery about Leitner. [ASA10]

The government's conduct in this case violated Mr. Abrams' rights under the Fifth and Sixth Amendments to the United States Constitution as reflected in *United States v. Henry*, 447 U.S. 264 (1980) and *Massiah v. United States*, 377 U.S. 201 (1964) and the applicable disciplinary rules [8] with its use of Grushko and Lerner to infiltrate Abrams' defense camp.

The manner in which the agents were used by the government and the effect their use had on Abrams' defense also violated Mr. Abrams' related rights to a jury trial, to confrontation, and the whole host of trial rights he gave up because of Mr. Grushko's instructions.[9]

From the critical moment of indictment and the retention of counsel onward, the Sixth Amendment imposes on

---

[8]*See* DR-7-104(A)(1), *Code of Professional Responsibility*; 28 C.F.R. Section 77.5. *See also*,; *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988); *United States v. Ofshe*, 817 F.2d 1508, 1516 n.6 (11th Cir. 1987); *United States v. Marshank*, 777 F.Supp. 1507 (N.D.Ca. 1991); Uviller, *Presumed Guilty, The Court of Appeals Versus Scott Turow*, 136 U.Pa..L..Rev.. 1880 (1988).

[9]To the extent the government used Grushko to elicit information from Abrams which it then used to pursue other leads against him and to build its case against Abrams **before** the formal initiation of criminal proceedings against Mr. Abrams, such conduct constitutes a violation of Mr. Abrams Fifth Amendment right to due process of law. *United States v. Marion*, 404 U.S. 307, 315 (1971) (pre-indictment constitutional violations of a defendant's rights are examined under the Due Process clause of the Fifth Amendment); *United States v. Irwin*, 612 F.2d 1182, 1885 (9th Cir. 1980); *United States v. Johnson*, 818 F.Supp. 1004, 1006 (S.D.Tex. 1993); *United States v. Marshank*, 777 F.Supp. at 1518-1519. *See also United States v. Russell*, 411 U.S. 423, 432 (1973) (The appropriate remedy for a Due Process violation where the government engages in conduct that shocks the universal sense of justice embodied in the Fifth Amendment, may be dismissal of the indictment). To the extent such conduct post-dated Abrams' arrest, the same cases establish that it violates the Sixth Amendment as well. *United States v. Henry*, 447 U.S. 264 (1980) It also is a violation of the applicable disciplinary rules.

government agents "an affirmative obligation to respect and preserve the accused's choice to seek the assistance of counsel." *U.S. v. Lozado-Rivera*, 177 F.3d 98 (1st Cir. 1999), *citing Maine v. Moulton*, 474 U.S. 159, 171 (1985).[10]

"Once the right to counsel has attached and been asserted, the [Government] must of course honor it. This means more than simply that the [Government] cannot prevent the accused from obtaining the assistance of counsel. The Court has made clear that, "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." "The Court should not condone unethical forms of trial preparation by prosecutors or their investigators." *Patterson v. Illinois*, 487 U.S. 285 (1987)(Brennan, dissenting)[11] *quoting Moulton*, 474 U.S. at 170-71.[12]

The knowing exploitation by the government of an opportunity to confront the accused without counsel being present is as much a breach of the obligation not to circumvent the right to the assistance of counsel as is the

---

[10]In *Moulton, Supra.*, at 174-75, the Court reiterated that the "identity of the person who instigated the meeting at which the government obtained incriminating statements was not decisive or even important." Nor need the government even have taken "affirmative steps to obtain the incriminating statements" for there to have been a violation of the Sixth Amendment. It is enough that the agent "must have known" that the informant "would take affirmative steps to secure incriminating information." *Id.*

[11]An *ex parte* communication between an agent of the government and a represented defendant "can only be viewed as an attempt to "circumven[t]" and "dilute[]" the protection afforded by the right to counsel. *Id.*, at n.2.

[12]"The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State." *Moulton* at 176.

intentional creation of such an opportunity.[13] It is hard to know what it will take for the Second Circuit to do something more than just note its disappointment in such government conduct. Clearly, warnings of stronger action have fallen on deaf ears. See, e.g., *United States v. Pelaes*, 790 F.2d 254, 258 (2d Cir. 1986)("In ruling that Pelaes's Sixth Amendment rights were not violated in the present case, however, we note that this is not the first incident of its kind, and **we caution the government that it is the responsibility of the United States Government, not just of the United States Attorneys, to see that the rights of a defendant are not infringed.**, citing *United States v. Cruz*, 785 F.2d 399 (2d Cir. 1986); *United States v. Calder*, 641 F.2d 76, 78-79 (2d Cir.), *cert. denied*, 451 U.S. 912 (1981) as other examples of the same. This Court went on to warn that it would not condone future claims of innocent or mistaken conduct that violated the Sixth Amendment with tactics similar to those used in *United States v. Henry*, 447 U.S. 264 (1980) or like those in the instant case. Here the Panel did just that. *Maine v. Moulton*, 474 U.S. at 176.[14] Indeed, under

---

[13]In his dissent in *Illinois v. Perkins*, 496 U.S. 292, 309 (1990), Justice Marshall predicted that decisions which diminish Sixth Amendment protections would end up encouraging police and prosecutors to come up with ever more creative ways to circumvent the spirit of the protections accorded to an accused by the very means used in the instant case, characterizing such means as abhorrent."

[14]The controlling test is whether the government agent "intentionally created a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel. *United States v. Henry*, 447 U.S. 264, 274 (1980). That the government does not explicitly instruct a cooperating witness to procure incriminating statements is not dispositive; for conduct by an individual may in certain circumstances be imputed to the government even where it has not affirmatively directed the person to interrogate the defendant. *Id.*; *Hancock v. White*, 378 F.2d 479 (1st Cir. 1967)(holding that Massiah can be violated even though statements were procured without and trickery or subterfuge).

the circumstances of the instant case, merely having Lerner (and Grushko) participate and report on the conversations was the "functional equivalent of interrogation. *See, Moulton* at 177, n.13.[15]

The Sixth Amendment protections apply equally to coercive interrogations of a defendant in custody and to an "indirect and surreptitious interrogation" made possible through the use of informants. *United States v. Terzado-Madruga*, 897 F.2d 1099, 1109-1110 (11th Cir. 1990). While the Sixth Amendment is not violated whenever such statements are obtained "by luck or happenstance" **any** participation by a government informant "beyond merely listening" becomes the "functional equivalent" of direct police interrogation. *Id.* quoting from *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986).[16] This is so because, "[b]y concealing the fact that the informant is a government agent, the police deny an accused the right to rely on counsel as a "medium" between himself and the government, a right guaranteed by the Sixth Amendment. *Id.* at 1110.

This Court's decision in *United States v. Henry*. 447 U.S. 264 (1980) compels the reversal of the conviction in this

---

[15]The Fourth Circuit recently recognized, "[T]he Supreme Court has never retreated from *Moulton*." *United States v. Melgar*, 139 F.3d 1005, 1013, n.1 (4th Cir. 1998).

[16]The "luck or happenstance" exception, recognized in Henry and subsequent cases is a very limited concept and not at all applicable here. It is neither "luck" nor "happenstance" where the government uses an informant, under these circumstances, because it knows he is likely to induce the defendant to make incriminating statements. It is just as strong a violation of *Henry* as any other, even if this Court perceived the government's conduct as merely "exploiting an opportunity" to, in effect, question Mr. Abrams on these subjects by having Lerner (or Grushko) act as its ears. See e.g. *Franklin v. Duncan*, 884 F.Supp. 1435, 1451-1452 (N.D. CA 1995); *United States v. Medina-Medina et al.*, 617 F.Supp. 1163, 1171-1172 (S.D. CA 1985); *Cahill v. Rushen*, 501 F.Supp. 1219, 1222-1226 (E.D. CA 1980)(finding post-trial violation of *Henry* and Sixth Amendment right to counsel)

case. The government's conduct in *Henry* was far less egregious than in the instant case. In *Henry*, the government used an inmate housed with the defendant to report information from the defendant to the prosecution. The inmate did not previously know the defendant, his informant status was concealed from the defendant and his instructions were to simply "be alert" to any comments by the defendant, but not to initiate any discussions with him about the case. *Henry*, 447 U.S. at 266 and 268. The Court found that such use of a government agent, even in a passive role ("be alert"), post-indictment, violated the defendant's Sixth Amendment rights. The Court noted that such use of a government agent permits the government to elicit information from a defendant which he would not intentionally reveal to persons known to be government agents. Id. at 273 The Court also noted that the Sixth Amendment must be applied to bar such "indirect" and surreptitious "interrogations" if it is to have "any efficacy." Id. In addition to the constitutional violation, such conduct by a prosecutor constitutes a violation of DR 7-104[A][1] and EC 7-18. Id. at 275, n.14

In the instant case, the government's conduct was far more pro-active and intrusive. Grushko and Lerner were sent in to elicit the most confidential and legally protected information and agent Coleman questioned him in detail as on what he had learned. [A208] The Lerner letter reveals that he had a ten year relationship with Mr. Abrams. Grushko's was even closer. The *Henry* Court wrote that the use of a person with a long-standing relationship with the accused would be especially egregious. *Henry*, 447 U.S. at 274, n.12.

Lerner's letter also reveals that he provided the government with information Abrams clearly intended to keep confidential regarding his business affairs, the course of investigation his attorney intended to pursue, possible defenses he and his attorney were considering, and other details related to the government's investigation. [A208]

Lerner attempted to hold Mr. Abrams' trust by falsely assuring him that he was not an informant in the case. He reported that Abrams believed him and considered the idea of Lerner being an informant "preposterous". [A207] In fact, as we now know from the *ex parte* Coleman affidavit first disclosed on this appeal, [GA14-17], Lerner was **a primary informant** against Mr. Abrams.

All of these facts make the government's conduct in this case far more egregious than the conduct in *Henry* and far more clearly a violation of the defendant's Sixth Amendment rights. Nothing could be more valuable to a prosecution or to the ability to make a strong pitch for a guilty plea than the most highly confidential information Lerner provided.

Massiah v. United States, 377 U.S. 201 (1964) was the Court's first application of the Sixth Amendment to post-indictment communications between an accused and an agent of the government. The Court found an interference with the right to counsel by the government's post-indictment use of Massiah's co-defendant, a concealed "cooperator," to elicit information from Massiah relevant to the case against him. The Court emphasized the importance of the period of time that follows the indictment and arraignment for the thorough evaluation, investigation and preparation of the case for the defendant. It characterized this as "perhaps the most critical period of the proceedings." *Massiah*, 377 U.S. at 205-06 The right to counsel is as important at this stage as it is during a trial. Denying the defendant the ability to exercise this fundamentally important right by surreptitiously obtaining information without counsel present or otherwise interfering with the right cannot be permitted. Id. The Court further emphasized that the defendant did not know at the time that the person to whom or in whose presence he was speaking was a government agent. Id. at 206. Here, Lerner and the government concealed that fact right up until this appeal.

In *Hammad*, this Court was presented with the question of whether the government's use of a cooperating witness to

elicit evidence from a suspect before the suspect actually was indicted, but after it was known that he had retained counsel, violated DR 7-104(A)(1), Code of Professional Responsibility, which prohibits a lawyer from communicating with a "party" he knows to be represented by counsel regarding the subject matter of that representation. *Hammad*, 858 F.2d at 836; EC 7-18. Courts can exercise their supervisory power to enforce professional responsibility standards. Id. at 837 The Eastern District of New York expressly adopted the Code of Professional Responsibility.

The government's use of Lerner and Grushko clearly violated DR 7-104(A)(1). As the Lerner letter to AUSA Kirsch reveals, the government well knew that Abrams was represented by counsel at the time they sent Lerner in to elicit information and when they were de-briefing him (Lerner described the time periods of his work for the government as between November 2, 1992, the day of Abrams' arrest and November 9, 1992, the day of Abrams' indictment, and after November 9, 1992. [A207-08]).

The government's conduct in this case as thoroughly as possible undermined DR 7-104(A)(1) which reflects an attorney's "duty 'to maintain the highest standards of ethical conduct'" and which is "designed to safeguard the integrity of the profession and preserve public confidence in our system of justice." *Hammad*, 858 F.2d at 839; *Preamble, Code of Professional Responsibility*. There was nothing uncertain about this when these prosecutors made the affirmative decision to flagrantly and arrogantly violate the Rule.

The government used Lerner to infiltrate Abrams' defense camp to elicit information about his case and his defense strategy and to report the same to the case agent before Abrams' plea. [A207-08] He was entitled to know this in evaluating the government's case. The information Lerner elicited from Abrams and the full exposition of Abrams' defense strategy garnered from meetings between Abrams

and his attorney enabled the government to obtain evidence and to present facts to Abrams during plea negotiations and to highlight certain points during such negotiations in order to convince him to plead guilty. [A371,¶9]

II. THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHERE THE BURDEN FOR ESTABLISHING REVERSIBLE ERROR FROM THE GOVERNMENT'S INTENTIONAL INTERFERENCE WITH A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND BECAUSE IMPORTANT CONSTITUTIONAL ISSUES WERE WRONGLY DECIDED

It is beyond dispute that the government, through its various agencies intentionally interfered with Mr. Abrams' Sixth Amendment right to counsel. That is, despite the government's initial denials, it certainly was proven even to the court of appeals' satisfaction that several federal agencies, knowing Grushko to be Abrams' attorney, actively used him to obtain and pass along to them confidential attorney-client privileged information from Mr. Abrams, directly related to the activities at issue in Mr. Abrams' case, at a time when Abrams was under indictment. These agencies included, at a minimum, the SEC, the NASD, the U.S. Postal Service, and the U.S. Attorney's office for the Southern District of New York.

Additionally, although the panel below tellingly left out all mention of it from its decision, the government's conduct with respect to Mr. Lerner was at least as egregious as what it did with Grushko. Here, it was the case agent and the Eastern District prosecutor who, after Mr. Abrams had been indicted, enlisted the services of his bookkeeper. Lerner, to regularly attend defense strategy meetings

between Abrams and his criminal lawyer, and report back to the agent on the defense strategy and on the focus of the attorney-client discussions. This fact, admitted by Lerner himself in a sudden wave of conscience [A207], was wholly without contradiction by the government in the record below.

There may remain some question as to whether or to what degree the information from Grushko was passed along to the U.S. Attorney's office for the Eastern District of New York, and there certainly appears to be a dispute as to the legal significance of that question; however, there is no dispute whatsoever in the record that the unlawful interference through Lerner was performed by the Eastern District.[17]

It is, by now, axiomatic that the passing of tainted evidence from one governmental body to another (the so-called "Silver Platter" doctrine) does not somehow cure or vitiate the taint that attended its original procurement. *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Rose v. Mitchell*, 443 U.S. 545, 557 (1979); *United States v. PHE, Inc.*, 965 F.2d 848, 859 (10th Cir. 1992); *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980).

---

[17]The lower court's focus on which government agency did what is misplaced in a case like this in which there was the sharing of information among agencies. It is unfair for that to be a focus of the decision since the district judge repeatedly told the defendant that all he had to show was that some government agency used Grushko (or anyone else) to interfere with his rights and that such misconduct would be attributable to the Eastern District. [A445-46] This is yet another material area in which the district court did an about face in its decision, without any notice to the defendant whose lawyer had relied on the court's articulation of his burden. The Second Circuit's view on the subject is also wrong as a matter of law and conflicts with this Court's authority on the subject.

Moreover, it is universally accepted that the government's constitutional obligation to provide the defendant with exculpatory and impeachment evidence, goes beyond just the offices of the prosecutor on the case, and affirmatively requires that the prosecutor make inquiry of other agencies with which it is closely aligned or with which it has coordinated or communicated in the investigation or prosecution of the case and reveal all such evidence in the files of any other such entity as well. *See e.g., United States v. Miranne*, 688 F.2d 980, 988 (5th Cir. 1982); *United States v. Jackson*, 850 F.Supp. 1481, 1502 (D. Kan. 1994); *United States v. Burnside*, 824 F.Supp. 1215, 1253 (N.D. Ill. 1993).[18] The broader view finds support in the cases that first recognized the disclosure obligations. *See Brady v. Maryland*, 373 U.S. 83,87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972); ABA, *Project on Standards for Criminal Justice, Discovery and Procedures Before Trial* @ §2.1(d).

In *United States v. Avellino*, 136 F.3d 249 (2d Cir.), *rehearing denied*, 1998 U.S. App. LEXIS 7818 (2d Cir. 1998), the Second Circuit affirmed that "[A]n individual prosecutor is presumed ... to have knowledge of all information gathered in connection with his office's

---

[18]The Second Circuit, in recent years, has indicated that it takes a more narrow view than other courts regarding the breadth of the prosecutor's obligation to seek such evidence from other agencies. *Compare e.g., United States v. Avellino*, 136 F.3d 249, 255-56 (2d Cir.), *rehearing denied*, 1998 U.S. App. LEXIS 7818 (2d Cir. 1998); *United States v. Gambino*, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), *aff'd*, 59 F.3d 353 (2d Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996)(rejecting "a 'monolithic' view of government") with *United States v. Levasseur*, 699 F.Supp. 965, 973-74 (D. Mass. 1988)("the government is considered a 'monolith'"; the prosecutor on the case is the "spokesman for the government" with respect to Brady material). However, this Court consistently has re-affirmed the principle that the duty includes at least other governmental entities with which it has communicated, coordinated, or jointly investigated the defendant and/or the case against him. *Avellino*, 136 F.2d at 255.

investigation of the case and indeed 'has a duty to learn any favorable evidence known to the others acting on the government's behalf in the case, ...'" *Avellino*, 136 F.3d at 255; *see also, Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995)(expressly rejecting a more restrictive view of the breadth of the prosecutor's obligation and, at 433, rejecting any distinction between exculpatory and impeachment evidence). Tellingly, there is no mention of *Kyles* in the decision below.[19]

---

[19]In *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989), the government took the same sort of restrictive view of its obligations under *Brady* and Rule 16 that the Panel in this case took. In soundly rejecting this on *de novo* review, the Ninth Circuit convincingly explained why such a position is unfair to the defendant and untenable as a matter of law. There, as here, the prosecution argued that its obligations ended at the border of its district. The *Bryan* Court noted that it already had joined the Fifth Circuit in clearly holding that "the government", for discovery and Brady purposes includes at least both the "prosecutor and closely connected investigative agencies." *Bryan*, 868 F.2d at 1036, *citing United States v. Gatto*, 763 F.2d 1040, 1047 (9th Cir. 1985); *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). The court rejected an argument that the defendant's rights under Brady and Rule 16 extend only to those materials and information within the actual possession of the prosecutor or physically located within the district; for such a rule would "unfairly allow the prosecution access to documents (and information) without making them available to the defense." *Bryan*, 868 F.2d at 1036. (Citation omitted) *See also, United States v. Melgar*, 139 F.3d 1005, 1014 (4th Cir. 1998)(an interesting discussion of the appropriate remedy where there is collusion among agencies deemed to amount to a violation of the "affirmative obligation not to act in a manner that circumvents' [a defendant's] Sixth Amendment right to counsel. The court rejected a rule that would require the prosecutor to "comb the files" of every single agency that **might** have some relevant information; but it found that the only "fair balance" among the competing interests, at least must provide that the "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant" and therefore must disclose all of the same to the defense. *Id.* It is the prosecutor's knowledge and access that is the key in each case.) *Id.*

The decision in *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995) contains language that also is instructive for the instant case. In *Wood*, the defendants were prosecuted for a conspiracy to defraud the

In any event, while the Second Circuit found itself "disturbed" by the record in this case, [App. 7], it squarely held that even if the government misconduct occurred and even if the unlawfully obtained information flowed to the Eastern District, Mr. Abrams is not entitled to withdraw his plea because he purportedly did not prove that the case against him in the Eastern District was dependent on this illegally obtained information. [App. 7-8]

The Second Circuit has placed the burden of proof in this regard squarely on the wrong party. The proper test, recognized by the majority of other Circuits, is that once such intentional interference with a criminal defendant's fundamental constitutional rights has been shown, the government bears the burden of proving that is case was not

---

Food and Drug Administration, under 18 U.S.C. § 371. The case was prosecuted by the United States Attorney's office. The Court held that material in the possession of the FDA that related to the safety of the drug at issue in the case was chargeable to the prosecution and was *Brady* material which had to be disclosed, under penalty of reversal, even though the actual prosecutor on the case did not know the contents of the materials at issue.

The court held that "under *Brady* the agency charged with administration of the statute, which has **consulted with** the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute." *Wood*, at 737.

The court wrote further that "[T]he government cannot with its right hand say it has nothing while its left hand holds what is of value." Id., citing *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989). "The government in the form of the prosecutor cannot tell the court that there is nothing more to disclose while the agency interested in the prosecution holds in its files information favorable to the defendant." *Id. Accord, United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999)(FDA materials imputed to U.S. Attorney); *United States v. Aviles*, 170 F.3d 863, 867 (9th Cir. 1998)(DEA knowledge imputed to FBI); See also, *United States v. Jacobs*, 986 F.2d 1231, 1234 (8th Cir. 1993); *United States v. Anderson*, 31 F.Supp. 2d 933, 948 (D. Kan. 1998). There was far more than "consultation" here.

at all based on the tainted evidence and that the guilty plea was not at all a product of such unlawful conduct.

Government interference with a criminal defendant's relationship with his attorney deprives him of his Sixth Amendment right to effective assistance of counsel. *United States v. Irwin*, 612 F.2d 1182 (9th Cir. 1980)

The lower court's decision in this case reflects a minority view of perhaps one; more importantly, it reflects a profound misunderstanding of the proper allocation of the burden of proof with respect to intentional intrusions on a defendant's Sixth Amendment rights.

The leading decisions from the Supreme Court serve only as a starting place for the inquiry in the instant case. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the undercover agent (co-defendant) intruded on some attorney-defendant preparatory sessions; but he did not disclose to anyone at any time what he heard or saw regarding the defendant's plans, trial strategy, etc. *Id.* at 548. Under those circumstances there would be no reversal absent a showing of prejudice. The Court emphasized that there was no substantial threat to the Sixth Amendment right because nothing from the intrusion was disclosed to the government and that there was no showing that the intrusion was purposeful by the government, with the goal of learning about the defendant's case. Id. at 556-58 If either had been the case, the defendant would have had a different and stronger case. Id. at 554.

In the instant case, there can be no dispute about the facts that Lerner was instructed by the Eastern District to intrude into Abrams' meetings with his attorney to learn about, *inter alia*, his defense strategy. The Southern District did the same with Grushko. In both cases, Lerner and Grushko passed along what they had learned through the intrusions and the government affirmatively debriefed them on it and brazenly directed and encouraged the violations.

The decision in *United States v. Morrison*, 449 U.S. 361 (1980) is of only slightly more help. Federal agents met with the defendant outside the presence of her attorney and

made disparaging remarks about the attorney. The Court found that under the facts of the case, dismissal of the indictment with prejudice was not the appropriate remedy. However, the Court expressly declined to adopt the government's argument that prejudice would be required to establish a Sixth Amendment violation for even an intentional interference like that, leaving the question open in implicit recognition of the fact that the prejudice requirement in *Weatherford* for unintentional intrusions does not necessarily apply for intentional intrusions. *See also, Weatherford v. Bursey*, 429 U.S. 545 (1977); *United States v. DiGregorio*, 795 F.Supp. 630 (S.D.N.Y. 1992).[20]
In the instant case the intrusions were intentional and far more intrusive.

Cases from the Circuit courts are a bit more helpful. Under the test adopted by the Third and Tenth Circuits, such intentional, knowing, and deliberate intrusions as were engaged in here would constitute *per se* reversible error with no further showing of prejudice required. *United States v. Costanzo*, 625 F.2d 465 (3d Cir. 1980); *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978); *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995). That is the standard that Mr. Abrams urges this Court to adopt in such cases as this. Such a standard is required to send the appropriate message. *See South Carolina v. Quattlebaum*, 527 S.E. 2d 105 (S.C. 2000)

The Second Circuit in the past and the D.C. Circuit at present have recognized that prejudice may not be required

---

[20]Since *Morrison*, courts have focused on whether such an invasion was intentional and whether or not the defendant was prejudiced by the government agent's conduct. While some Circuits find a *per se* Sixth Amendment violation from such interference, the Second Circuit has in the past seemed to require some intentional conduct and prejudice. *United States v. Hammad*, 846 F.2d 854 (2d Cir. 1988); *United States v. Morales*, 635 F.2d 177, 179 (2d Cir. 1980); *United States v. Amlani*, 111 F.3d 705, 711 (9th Cir. 1997) ("Prejudice" does not mean having to show that replacement counsel was inadequate).

when an intrusion is intentional; but they have left the question open. *United States v. Morales*, 635 F.2d 177, 179 (2d Cir. 1980)("Because the ... evidence ... does not disclose an intentional, governmentally instigated intrusion upon confidential discussions between appellants and their attorneys, the evidence does not support appellants' claim of a *per se* violation of their right to counsel."); *Briggs v. Goodwin*, 698 F.2d 486, 493 n.22 (D.C. Cir.)(noting that [a] deliberate attempt by the government to obtain defense strategy information or to otherwise interfere with the attorney-defendant relationship through the use of an undercover agent may constitute a *per se* violation of the Sixth Amendment."), *reh'g granted, opinion vacated, and on reh'g*, 712 F.2d 1444 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *United States v. Kelly*, 790 F.2d 130 (D.C. Cir. 1986)(holding that some prejudice or some evidence establishing one or more of the *Weatherford* factors may be required; but noting at n.6 that some such errors can be so "fundamental and pervasive" that the violation itself will be deemed automatically to be prejudicial). The Second Circuit's decision in the instant case is a major departure from its previous holdings.

The Ninth and Sixth Circuits have distinguished between an intentional intrusion and the unintentional type of intrusion in *Weatherford*, but still require some showing that through the intrusion the government agent obtained some prejudicial evidence, in favor of the *per se* rule. *United States v. Glover*, 596 F.2d 857, 863-64 (9th Cir.), *cert. denied*, 444 U.S. 857, and *cert. denied*, 444 U.S. 860 (1979); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir.), *cert. denied*, 467 U.S. 1029 (1984).

The First Circuit holds that there must be some showing of "a 'reasonable possibility of injury' to defendants or 'benefit to the state' as a result of the government's intrusion." Once that minimal showing is made the burden shifts so that the government then bears the "high burden" of proving no taint and no prejudice to the defendant. *United*

States v. Mastroianni, 749 F.2d 900, 907 (1st Cir. 1984)(also noting that the Supreme Court has left open the question of what, if any, showing of prejudice is required and who bears what burden) ; *Cinelli v. City of Revere*, 820 F.2d 474, 478 (1st Cir. 1987), *cert. denied*, 485 U.S. 1037 (1988). *See also, United States v. North*, 910 F.2d 843 (D.C. Cir.), *amended*, 920 F.2d 940 (D.C. Cir. 1990)(requiring government to bear heavy burden of proving all evidence came from independent sources when witness interviews and evidence were tainted by exposure to immunized testimony, applying *Kastigar v. United States*, 406 U.S. 441 (1972)).

The conduct here should be treated as a *per se* violation that automatically permits plea withdrawal. At a minimum, the joint investigative efforts among the agencies, must at least shift the burden to the government to prove no taint.[21]

This Court should resolve the question it has left open and send the urgently needed message that such intrusions into these all important rights will not be tolerated.

Here the government interference through Grushko and Lerner was unquestionably deliberate and most prejudicial in all regards and it was much for far-reaching than in any other case. The right to effective assistance of loyal, conflict-free counsel is the most important right a criminal defendant enjoys, for it affects his ability to exercise any other right he may have. *Cronic v. United States*, 466 U.S. 648, 654 (1984); *United States v. Bennett*, 409 F.2d 888, 900 (2d Cir.)(Friendly, J.), *cert. denied, sub nom. Haywood v. United States*, 396 U.S. 852 (1969)(The Sixth Amendment guarantee is designed to protect a defendant

---

[21]Ironically, the district judge instructed the parties before the evidentiary hearing that it would be the government's burden to prove that its case was not tainted by Grushko's work with the FBI, SEC, etc. [A357] The defendant relied on this understanding; then, inexplicably and without notice, the court entered its decision based on the exact opposite allocation of the burden. [A21-22]

from "falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered").

Where, as here, the interference with the defendant's Sixth Amendment rights is intentional on the part of a government agency, and there is abundant evidence of inter-agency cooperation, exchange of information, coordination, etc. this ought to be enough to lead to a finding of *per se* reversible error - at least where the question is the withdrawal of a plea under the "any fair or just reason" standard. This is in line with the Third and Tenth Circuits' position. At a minimum, the burden should be on the government to prove a lack of taint from the poisonous source as has proven workable in *Kastigar* and *North*.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Writ of Certiorari be issued.

Respectfully Submitted,

David I. Schoen
Counsel of Record
LAW OFFICE OF DAVID I. SCHOEN
2800 Zelda Road
Suite 100-6
Montgomery, Alabama 36106
(334) 395-6611

TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Second Circuit
entered December 30, 1999 ..... App. 1

Order Denying Petition for Rehearing,
and Petition for Rehearing *En Banc*,
United States Court of Appeals
for the Second Circuit
entered April 07, 2000 ..... App. 10

Order,
United States District Court
for the Eastern District of New York
entered May 15, 1998 ..... App. 12

Order,
United States District Court
for the Eastern District of New York
entered September 30, 1997 ..... App. 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER
Entered: December 30, 1999

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of December one thousand nine hundred and ninety-nine.

Present: WILFRED FEINBERG,
FRED I. PARKER,
ROSEMARY S. POOLER,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

- v. - No. 98-1268

ALVIN ABRAMS,

Defendant-Appellant.

Appearing for Appellant:
David I. Schoen, Montgomery, AL

Appearing for Appellee:
Joel M. Cohen, Ass't U.S. Att'y, EDNY, N.Y., N.Y.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is **AFFIRMED**.

Defendant Alvin Abrams appeals from the judgment entered in the United States District Court for the Southern District of New York following his plea of guilty before Thomas C. Platt, Judge, convicting him of one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and two counts of securities fraud in violation of 15 U.S.C. § 77q. The district court sentenced Abrams to 30 months imprisonment, three years supervised release, a $75,000 fine, and costs. Abrams contends principally that his plea should be vacated because 1) the government's use of attorney Edward Grushko as an informant violated ethical rules; 2) the government violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose its use of Grushko; and 3) the plea proceeding violated Fed. R. Crim. P. 11. Abrams also appeals the denial of his recusal motion.

We review the district court's findings of fact that led to the denial of the motion to vacate the plea for clear error, and the decision itself for abuse of discretion. United States v. Williams, 23 F.3d 629, 635 (2d Cir. 1994). The district court may grant a motion to withdraw a guilty plea before sentencing for any reason that is "fair and just." *See* Fed R.

Crim. P. 32(e). However, the defendant does not have an absolute right to withdraw a guilty plea. United States v. Avellino, 136 F.3d 249, 261 (2d Cir. 1998). The defendant must show valid grounds for withdrawal of the plea which are not outweighed by prejudice to the government. See id.

Abrams argues that his plea should be vacated in light of government misconduct. Specifically, Abrams alleges that the government violated the Hammad[1] rule and DR 7-104(A)(1)[2] by using Grushko to infiltrate Abrams' defense, convince him to fire his first attorney, and convince him to plead guilty. In United States v. Hammad, we held that a prosecutor violated DR 7-104(A)(1) by using an informant as an alter ego to elicit incriminating statements from a suspect represented by counsel. See Hammad, 858 F.2d at 839. The Hammad rule does not extend to agents performing investigative functions. See United States v. Thompson, 35 F.3d 100, 104 (2d Cir. 1994). Grushko was Abrams' longtime confidante and erstwhile attorney on civil matters related to First Philadelphia Corporation. Grushko was also a convicted felon who was cooperating with the United States Attorney's Office for the Southern District of New York in order to secure a more lenient sentence on his own charges. While Grushko was not the attorney of record on the criminal charges in the Eastern District of New York, there was uncontroverted evidence that Grushko acted, at the very least, as an advisor or "shadow" counsel to Abrams.

---

[1] United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990).

[2] DR 7-104(A)(1) provides:

> During the course of the representation of a client a lawyer shall not [c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

However, Judge Platt found that there was "no showing or evidence of any kind that Mr. Grushko was working for the Government on this case or even that the Eastern District United States Attorney's Office ever knew Mr. Grushko was acting as a Government informant." Moreover, even if Southern District Investigator Doonan knew that Grushko was advising Abrams, the Hammad rule does not prohibit agents from using Grushko to learn information from Abrams. Nor is it clear that the Southern District's use of Grushko constituted an infiltration of Abrams' defense in the Eastern District's case. The district court was entitled to credit the testimony of former Eastern District AUSA Polkes and FBI Special Agent Coleman that the Eastern District prosecution team had no knowledge of, or control over, Grushko's activities and did not base their case on information supplied by Grushko. Therefore, we conclude that the district court did not abuse its discretion in denying Abrams' motion to withdraw his plea of guilty on the basis of "government misconduct."

Abrams' allegations regarding communications between the United States Attorney's Offices in the Southern and Eastern Districts which may have tainted the plea warrant greater consideration. Abrams argues that the district court should have permitted him to withdraw his plea because the government's failure to disclose its use of Grushko as an informant violated Brady v. Maryland. The government responds that Grushko was not Abrams' attorney of record in the Eastern District prosecution and misconduct on the part of the Southern District cannot be imputed to the Eastern District

The government has a due process obligation to disclose material evidence favorable to a defendant in a criminal prosecution. See Brady, 373 U.S. at 87; see Avellino, 136 F.3d at 255; The Brady rule encompasses not only exculpatory material "but also evidence that is useful for impeachment, i.e. having the potential to alter the jury's assessment of the credibility of a significant prosecution

witness." Avellino, 136 F.3d at 255; Giglio v. United States, 405 U.S. 150 (1972). The government's disclosure obligation applies to the defendant's decision to plead guilty. See United States v. Persico, 164 F.3d 796, 804 (2d Cir. 1999). "[T]he defendant is entitled to make [the decision to plead guilty] with full awareness of favorable (exculpatory and impeachment) evidence known to the Government." Persico, 164 F.3d at 804. "Although a guilty plea is generally considered valid so long as the plea was intelligent and voluntary. . . the validity of the plea must be reassessed if it resulted from impermissible conduct by state agents." Avellino, 136 F.3d at 255 (quotations and citations omitted). In fact, "where a Brady violation is established, that is, the court has found that the government withheld favorable information from the defendant and has ruled there is a reasonable probability that the information if disclosed, would have led the defendant not to plead guilty" the court is without discretion to deny the motion to withdraw the guilty plea. Id. at 261-262. The "test of materiality in the context of a plea is whether there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial." Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992). The issue of materiality "involves an objective inquiry that asks not what a particular defendant would do but rather what is the likely persuasiveness of the withheld information." Avellino at 256 (quotations and citations omitted). Materiality is a mixed question of law and fact, and while we give substantial deference to the district court's findings, we review the determination of materiality on an independent examination of the record. See id.; see also United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995).

A central issue raised by this appeal is the extent to which knowledge on the part of one government office may be imputed to another. While a prosecutor is presumed to

have knowledge of information gathered in his own office's investigation,

> knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require [the court] to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis.

See Avellino, 136 F.3d at 255 (quotation and citation omitted). In United States v. Quinn, 445 F.2d 940, 944 (2d Cir. 1971), for example, we refused to impute knowledge on the part of an AUSA in Florida to an AUSA in New York where there was no basis for concluding that they shared information or that the New York prosecutor had reason to know of the information contained in a sealed indictment. We were unwilling to conclude that "knowledge of any part of the government is equivalent to knowledge on the part of [a particular] prosecutor." Id.

This case, however, presents a closer question at least insofar as there are unquestionable links between the investigations in the Southern and Eastern Districts and Abrams suggests that one district accomplished that which the other could not do directly. Documents before the district court demonstrated that on August 6, 1992 - - well before Abrams' January 22, 1993 guilty plea and at the height of Grushko's cooperation with the Justice Department - - Southern District AUSA Tomback faxed several documents to AUSA Polkes in the Eastern District with a cover sheet that said "Good luck. Keep me posted." In that

packet, Tomback supplied Polkes with NASD documents as well as letters dated between July 29 and August 3, 1992 *from First Philadelphia Corporation to the SEC which were* signed by Abrams. This certainly suggests that the Southern District and Eastern District communicated and shared information and that the SEC formed a link between the two districts and their investigations of the First Philadelphia securities issues.

While these documents confirm that there was communication between the offices regarding the securities fraud investigation before Abrams pleaded guilty, it is not clear that the information supplied by the Southern District to the Eastern District was the fruit of Grushko's cooperation and that, aside from appearances, it actually tainted the plea. As in Avellino, where this court was clearly troubled by the prospect that Eastern District prosecutors had reason to know of information to which the defendant should have had access, Avellino, 136 F.3d at 256, we do not set aside Abrams' contentions lightly. However, we reiterate that to state a Brady violation Abrams must show both 1) the suppression of favorable evidence; and 2) the materiality of such information. That is, in order to set aside the plea, our independent examination of the record must convince us not merely that Abrams' decision would have been different but that the withheld information was objectively persuasive. See id. Having examined the record, even assuming that the Eastern District knew of Grushko's cooperation with the government (which the district court found it did not), we are not convinced that the government's failure to disclose Grushko's role was truly material. Even if information flowing from the Southern District's use of Grushko could be imputed to the Eastern District, and that fact were disclosed, its persuasiveness is not evident, especially in light of credited testimony of the Eastern District prosecution team that its case against Abrams depended not at all on information linked to Grushko's betrayal of Abrams' confidences. Therefore, while we are disturbed by this

record, we conclude that Abrams is not entitled to withdraw his plea.

We also reject appellant's argument that his plea should be vacated because it violated Fed. R. Crim. P. 11. Rule 11 of the Federal Rules of Criminal Procedure outlines the requirements for a plea allocution and "is designed to ensure that a defendant's plea of guilty is a voluntary and intelligent choice among the alternative courses of action open to the defendant." United States v. Andrades, 169 F.3d 131, 133 (2d Cir. 1999). Under Rule 11, the district court must "(1) determine that defendant understands the nature of the charge to which a plea is offered; and (2) make an inquiry to satisfy the court that a factual basis exists for the plea." Id. at 134. The court must determine whether the defendant understands the nature of the charges and place facts on the record after sufficient inquiry. See id.

We conclude that the plea comported with Rule 11. Contrary to appellant's contention, the district court did not have to inquire further into Abrams' physical and mental condition merely because he stated that he had sought psychiatric help in the past and had taken sleeping medication the night before the plea allocution. We defer to the district court's determination that Abrams's faculties were not clouded at the time of the plea. We are not persuaded that the allocution did not comport with Rule 11. The district court's efforts, while not exhaustive, were sufficient to ascertain that Abrams understood the charge and that a factual basis existed for the plea. Therefore, we reject appellant's Rule 11 claim in all respects.

We also reject appellant's challenge to his sentence based on the government's failure to move for downward departure pursuant to U.S.S.G. § 5K1.1, see Avellino, 136 F.3d 249, 260, and the district court's calculation of the "loss" enhancement pursuant to U.S.S.G. § 2F1.1.

The sentencing court's factual finding regarding the amount of loss was not clearly erroneous. See United States

v. Jacobs, 117 F.3d 82, 94 (2d Cir. 1997) (factual findings supporting offense level calculation reviewed for clear error).

Finally, we conclude that it was not an abuse of discretion for the district court to deny Abrams' recusal motion because his allegations of bias and "prejudgment" are without merit. See United States v. Roldan-Zapata, 916 F.2d 795, 802 (2d Cir. 1990).

We have considered all of appellant's contentions and have found them to be without merit. Accordingly, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Entered: April 7, 2000

Roseann B. Mackechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, *Foley Square*, in the City of New York, on the 7th day of April two thousand.

USA,

Appellee,

v. Dkt No: 98-1268

Alvin Abrams,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Alvin Abrams.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKENCHNIE, Clerk

By: /s/ Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

92 CR 1204 (TCP)

MEMORANDUM
AND
ORDER

Entered: May 15, 1998

---x

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALVIN ABRAMS,
Defendant.

---x

PLATT, District Judge.

Before the Court is defendant Alvin Abrams's motion to withdraw or vacate his plea for mental incompetence and lack of understanding. For the reasons discussed below, defendant's motion is denied.

Background

On January 22, 1993, defendant pled guilty to a three-count, superseding information charging him with one count of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 and two counts of securities fraud in violation of 15 U.S.C. § 77(q), all pursuant to a cooperation agreement dated December 29, 1992.

By motion dated March 25, 1996, defendant sought to withdraw or vacate his plea for the alleged breach by the

United States Attorney for the Eastern District of New York (sometimes "the government") of the parties cooperation agreement or alternatively to obtain an order of specific performance. In his affidavit accompanying this motion defendant alleged that the Government "breached its duties" to the defendant under their agreement by declaring that it would not file a motion on his behalf under Section 5K1.1 of the Guidelines Manual. Defendant claimed that this decision was "vindictive and in bad faith."

On March 26, 1996, defendant served three additional notices to withdraw his plea on the eve of his sentence date of March 29, 1996, based on (i) the alleged bad faith of the Government in its refusal to issue a 5K1.1 letter, (ii) the court's failure to comply with Rule 11 of the Federal Rules of Criminal Procedure and (iii) the ineffectiveness of his lawyer. In connection with such motions, defendant demanded, and the Court allowed, extensive discovery and protracted evidentiary hearings during the period between 1994 and October 1997.

Orally on September 30, 1997 and in a Memorandum and Order dated October 14, 1997, the Court denied defendant's motions finding specifically that the defendant had "nearly two years to proffer sufficient evidence indicating that the Government has in some way acted in bad faith and failed to do so."

At what was in effect a reargument hearing held on October 20, 1997, Court granted defendant a second opportunity specifically to detail at length in an affidavit the full and complete extent of his cooperation with the Government.

Following defendant's supplemental submissions in November of 1997, the Court drafted the annexed supplemental Memorandum and Order dated "November __, 1997," but did not issue the same only because defendant declared that he was going to make additional motions.

In the meanwhile, at the conclusion of the evidentiary hearings on September 30, 1997, defense counsel indicated

that he would be ready to proceed with sentencing after consulting with a sentencing expert within the next few days and that he intended to submit "some psychiatric input" into the already prepared presentence report. He never suggested then or at any previous time that defendant had been mentally incompetent at the time of his guilty plea.

Nonetheless, on April 8, 1998, over five years after defendant pled guilty, he made an additional motion to vacate his guilty plea on the ground that he was mentally incompetent at the time of his plea.

This motion is frivolous, and it is quite clear, therefore, that the defendant is abusing the process of this Court.

Discussion

In support of his "mental incompetence" motion, defendant relies primarily on (i) an affidavit sworn to on December 29, 1997, by Dr. Herbert Freudenberger, a practicing psychologist, who began treating the defendant in May 1993, four months *after he pled guilty*; (ii) the report dated March 10, 1998 of Dr. Howard Zonana, Director of the Connecticut Mental Health Center and member of Yale Department of Psychiatry, based on his interviews of the defendant and his wife in December 1997; (iii) the report dated March 11, 1998, of Dr. Madelon Baranoski, based on his interview of the defendant in late December 1997; (iv) of Dr. Robin Motz, Assistant Professor of Clinical Medicine, Columbia University College of Physicians and Surgeons, based on information provided by defense counsel in 1998; and (v) the report dated March 20, 1998, of Dr. Dennis S. Charney of the Yale Department of Psychiatry and School of Medicine, based upon materials submitted to him by defense counsel; together with affidavits from the defendant, from his former attorneys and from a lifetime friend and copied pages from the 1994 Physicians Desk Reference and from

the Diagnostic and Statistical Manual of Mental Disorders (4th ed.)

Apart from the fact that Dr. Freundenberger did not begin treating the defendant until four months after he pled guilty, much of the key portions of his analysis are without support. For example, he speculates that the defendant was "self medicating on a wide variety of psycho tropic drugs" when he pled guilty, completely ignoring the fact that defendant on January 22nd in his statements to the Court in connection with his plea, represented as follows:

THE COURT:	Have you ever been hospitalized or treated for narcotics?
THE DEFENDANT:	No, sir.
THE COURT:	Are you on medication? Are you using any drugs of any kind?
THE DEFENDANT:	Only some medication for sleeping.
THE COURT:	Have you taken those recently?
THE DEFENDANT:	Yes.
THE COURT:	How long ago?
THE DEFENDANT:	Last night.
THE COURT:	How about this morning?
THE DEFENDANT:	No.

Moreover, in his final conclusion Dr. Freundenberger states that the defendant must not have been able to "make rational choices from among the alternatives available to him... nor to provide meaningful assistance to his defense attorneys."

Dr. Zonana, however, noted that during his interview of Mrs. Abrams, she said that defendant told her just before he pleaded guilty that "he had agreed to plea to a securities charge because it seemed like the lesser charge than the structuring charge at the time."

The defendant, himself, confirmed to Dr. Zonana that he had made this choice and that he later regretted it because "in retrospect he feels he would have been better off pleading to the structuring charge as the law was clairified a few months after his plea and he was innocent of [that] charge." This was clearly a knowledgeable and rational choice made by the defendant at the time of his plea among available alternatives.

Indeed, one of grounds on which the defendant previously moved this Court to withdraw his plea was his claim that he did not understand when he pled guilty that he was pleading to securities fraud rather than to structuring. This was equally clearly a misrepresentation to the Court.

Dr. Zonana's opinion with respect to the defendant's present mental condition was (as the Government points out) that (i) he was cooperative during his interviews; (ii) speaks in a normal tone; (iii) his 1992 and 1993 wearing of a bullet proof vest was appropriate considering the people with whom he interacted; (iv) there is no evidence that he has ever visually hallucinated; (v) he functions well cognitively including being able to orient himself accurately to the date, to remember the names of political leaders, to recognize and remember objects and numbers and to abstract by proper interpretation; (vi) there is no evidence of any organic impairment; (vii) his memory was "average" to "high average"; (viii) he is of average intelligence; (ix) his ability to reason abstractly and to interpret social norms was "low

average"; and (x) he was able for many years to maintain and organize his work related activities and to achieve relative success in his business as a financial advisor and stock broker.

With commendable frankness, Dr. Zonana stated that it was difficult to reach any precise conclusion about Mr. Abrams state of mind at the time of the plea agreement and the guilty plea in January 1993.

The fact is that none of the defendant's experts had any real basis on which to conclude that the defendant was mentally incompetent at the time of his plea agreement and the entry of his plea of guilty in this case in December of 1992 and January 1993.

It is interesting to note that in his colloquy with the Court at the time of entry of his plea of guilty on January 22, 1993, the defendant in answer to a question by the Court as to whether he was currently or had recently be under the care of a physician or psychiatrist said, "I am consulting with a psychologist, yes. I have consulted with a psychiatrist, yes." No statement or affidavit with respect to the opinions of these persons was submitted to the Court.

In answer to defendant's first motion, the Government has submitted a letter dated April 20, 1998, addressed to the Court containing a comprehensive analysis of the material submitted by the defendant and "voluminous" documents and tape recordings of defendant and an FBI target during the period when defendant attempted to cooperate in 1993 and copies of the FBI 302's which reflect defendant's admissions to the FBI before and after his guilty plea together with a copy of defendant's November 7, 1991, sworn deposition before the Securities and Exchange Commission, all of which demonstrate quite conclusively that defendant was mentally competent when he pled guilty in January 1993 and has remained mentally competent since then.

Conclusion

For all of the foregoing reasons, and the analyses provided by the government in its letter dated April 20, 1998, defendant's request for additional evidentiary hearings and for an order vacating his plea of guilty, must be, and the same hereby is, denied.

SO ORDERED.

\s\ Thomas C. Platt
District Judge, U.S.D.C.

Dated: Uniondale, New York
May 15, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

92 CR 1204 (TCP)

MEMORANDUM
AND
ORDER

Entered: September 30, 1997

---x

UNITED STATES OF AMERICA,

v.

ALVIN ABRAMS,
Defendant.

---x

PLATT, District Judge.

Defendant moved on March 8, 1996 to withdraw his plea of guilty entered on January 22, 1993, pursuant to a Cooperation Agreement, dated December 29, 1992, with the Government to waive indictment and pled guilty to three counts of a Superseding Information charging him with conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371 (Count One), and two counts of securities fraud, in violation of 15 U.S.C. § 779q (Counts Two and Three).

The grounds for the motion are that, unbeknownst to defendant, his attorney in civil matters, Edward Grushko, Esq., pled guilty to criminal felony charges in the District of Nevada and was cooperating with the Government in "making cases" against other violators of the securities laws and that Mr. Grushko urged defendant to plead guilty to the

criminal charges against him and to enter into a Cooperation Agreement with the Government. Representing defendant on the criminal charges were first, Joel Winograd, Esq., a very experienced and qualified criminal lawyer, and second, the law firm of Phelan & Costello by Robert J. Costello, Esq. Defendant's decision and agreement to pled guilty to the indictment and to cooperate with the Government came when he was being represented by the latter firm.

On November, 2, 1992, defendant was arrested pursuant to a complaint and, on November 9, he was indicted by an Eastern District Grand Jury on charges that he structured transactions in violation of 31 U.S.C. §§ 5324(a) and 5322. On December 29, defendant entered into a Cooperation Agreement with the United States Attorney's Office for the Eastern District of New York and, on January 22, 1993, he waived indictment and pled guilty pursuant to that Cooperation Agreement to a three count Superseding Information charging him with conspiracy to commit and the commission of securities fraud and deceit upon purchasers in the offer of sales and securities of corporations. He did not plead guilty to structuring charges.

Defendant did not, in the United States Attorney's view, cooperate pursuant to his agreement to do so and, on March 8, 1996, defendant's then counsel, Larry Bronson, Esq., filed the first of many motions to vacate his guilty plea.

Subsequent to the entering of his plea and prior to sentence (i) the Government decided that defendant's cooperation was inadequate, and (ii) the defendant claimed he discovered that Mr. Grushko had been working for the Government on his (Grushko's) case. The U.S. Attorney's Office in this District denied (i) having knowledge of Mr. Grushko's case or agreement and (ii) having received any information from Mr. Grushko, directly or indirectly, in preparation for or use in or support of its case against the defendant.

Defendant requested and was given over two years of discovery, including the production of innumerable

(thousands of) documents claimed to bear on defendant's alleged "conflict of interest" question and also took testimony from seven witnesses in an effort to find some evidence in support of the claimed "conflict." As to a number of the documents, the Government claimed certain privileges and the Court reviewed the same, document by document, and found nothing of any relevance to defendant's claim. In short, after some thirty months (or more) of discovery, defendant has found nothing to support his claim.

Defendant argues that this Court failed to conduct the plea proceedings in accordance with Rule 11. On January 22, 1993, when defendant pled guilty to the three counts in the Superseding Information, this Court read to the defendant in open Court the charges and he readily admitted to having committed the acts specified therein. U.S. v. O'Hara, 960 F.2d 11, 13 (2d Cir. 1992). He also, of course, admitted in writing to the commission of the crimes in his Cooperation Agreement. Thus, defendant's claim of error in the procedural aspect of taking the plea is without merit.

Defendant also argues that when he pled guilty to conspiracy to commit securities fraud and two counts of committing securities fraud, he thought he was pleading guilty to the original indictment against him charging him with structuring his check cashing activity because he had been advised that his (claimed) lack of knowledge that structuring was against the law was no defense (which was the law in the Second Circuit until it was overruled in 1994 by Ratzlaf v. U.S., 114 S. Ct. 655 (1994), and then, was no longer the law). This, of course, is a little far-fetched because at the time of his plea, defendant read and signed his Cooperation Agreement, waived indictment to enter a plea to the new charges, and pled guilty to the new charges.

The Cooperation Agreement dated December 29, 1992, into which defendant entered with the Government, did not provide for a violation of 31 U.S.C. § 5324, the so-called anti-structuring law, but for violations of the securities laws. There was a paragraph, amongst three other

paragraphs, alleging "parts" of the conspiracy charge, which particular paragraph provided that it was "part of the conspiracy that, in order to keep the scheme a secret, the defendant... obtained the cash from his banks by writing numerous checks all payable in amounts under ten thousand dollars ($10,000)" and Count One also recited three overt acts of money structuring in support of the securities fraud. The offenses charged, however, were securities fraud not money structuring. In short, defendant's claimed "mistake" is not material to Count One and certainly not material to Counts Two and Three.

There has been no showing or evidence of any kind that Mr. Grushko was working for the Government on this case or even that the Eastern District United States Attorney's Office ever knew Mr. Grushko was acting as a Government informant. Moreover, there was no evidence that the Government deprived or attempted to deprive defendant of effective assistance of counsel or due process of law or violated any ethics rule or fundamental right. Defendant's attorneys actually representing him on this case are not shown to have been working in any way with the Government. It is not the Government's duty to check out all other attorneys in other civil matters to determine their relationship with the defendant, if any, with the Government in different matters. After several months of discovery, no conflict has been unearthed and no exculpatory material has been shown to be in the hands of the Government.

Notwithstanding the absence of proof, defendant argues that the Court should infer that the U.S. Attorney in this District must have known that Mr. Grushko was operating as an informant for the Government in the case at bar. Without some evidence or proof, no such inference may be made. It is equally, if not more, logical to infer that Mr. Grushko confided in Mr. Abrams the details of his deal with the Government and urged him to make a similar deal. There is, however, no proof on either question.

CONCLUSION

For all of the foregoing reasons, defendant's motion to vacate his plea of guilty must be, and the same hereby is, DENIED.

SO ORDERED.

\s\ Thomas C. Platt
Thomas C. Platt, U.S.D.J.

Dated: Uniondale, New York
September 30, 1997